87-306

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ____

WILLIAM CONDREN and INTERNATIONAL AIR LEASES, INC.,

Petitioners,

—against—

AIRCRAFT TRADING AND SERVICES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEFFREY A. FILLMAN
Box 465
Lakeville, Connecticut 06039
(203) 435-2924

Counsel for Petitioners

August 18, 1987

QUESTIONS PRESENTED

1. Whether the interpretation of the Federal Aviation Act by the Court below is in conflict with the decision of this Court in *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406 (1983).

2. Whether Section 503(c) of the Federal Aviation Act (49 U.S.C. Sec. 1403(c)) bars the chattel mortgagee under an aircraft or aircraft engine chattel mortgage from retroactively encumbering marketable title to the aircraft or engine that was purchased for value by a person who did not have actual knowledge of the existence of the mortgage at a time when the mortgage was not recorded in the Federal Aviation Agency.

3. Whether United States Code Section 1406 enables the holder of a chattel mortgage covering an aircraft engine who has failed to record in compliance with the Federal Aviation Act to rely on State law to retroactively encumber marketable title to the mortgaged engine previously obtained by a purchaser for value without actual or constructive notice of the mortgage.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, William Condren and International Air Leases, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 22, 1987.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The opinion of the United States District Court for the Southern District of New York has not been officially reported and is reproduced in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 22, 1987. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

Sec. 1403. Recordation of aircraft ownership.

(a) The Secretary of Transportation shall establish and maintain a system for the recording of each of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines . . .; and also any assignment or amendment thereof or supplement thereto;

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under Section 1424(b) of this title for installation or use in aircraft . . .; and also any assignment or amendment thereof or supplement thereto.

. . . .

(c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation: . . .

(d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation. . . .

Sec. 1406. Law governing validity of certain instruments.

The validity of any instrument the recording of which is provided for by Section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, . . .

STATEMENT OF THE CASE

In December 1982, Respondent Aircraft Trading and Services, Inc. ("ATASCO"), sold a jet aircraft engine (the "Engine") to Northeastern Airlines ("Northeastern"), a United States commercial airline carrier, for promissory notes secured by a chattel mortgage (the "Mortgage") covering the Engine.

Although the Mortgage was required to be recorded under Section 403(c) of the Federal Aviation Act, ATASCO did not record it.

On November 28, 1984, Northeastern agreed to sell the aircraft containing the Engine to Braniff, Inc. ("Braniff"), a commercial airline carrier. At the time, Braniff did not have

actual or constructive notice that the Mortgage existed. Indeed, prior to completing its purchase, Braniff checked the appropriate records of the Federal Aviation Agency ("FAA") for prior claims or liens upon the aircraft or its engines or parts, and found no record of any encumbrances.

On November 30, 1984, after its purchase was consummated, Braniff duly filed its bill of sale with the FAA.

On December 7, 1984, Braniff sold the aircraft and engines thereon, including the Engine, to petitioner William Condren ("Condren"). It is undisputed that Condren checked the FAA records for prior claims and encumbrances before consummating his purchase, and he found none. Nor did Condren have actual knowledge of the existence of the Mortgage. Condren promptly filed his bill of sale.

In early February 1985, Condren leased the aircraft and attached engines (including the Engine) to Petitioner International Air Leases, Inc. ("IAL"). In that lease, Condren granted IAL an option to purchase the aircraft and engines upon expiration of the lease, and agreed to warrant good title to the aircraft and engines in the event the option was exercised. At the time Condren entered into the lease and irrevocably obligated himself to sell the aircraft and engines to IAL, the Mortgage had not been filed with the FAA, and neither Condren nor IAL had actual or constructive knowledge of its existence.

IAL did not file its lease with the FAA. In March 1985, ATASCO finally filed the Mortgage with the FAA and, in April 1985, ATASCO notified Condren of the existence of the Mortgage. In late July or early August 1985, IAL exercised its irrevocable option to purchase the aircraft and engines, and on August 5, 1985, IAL filed with the FAA the bill of sale by which Condren purported to convey to IAL good and marketable title to the aircraft and engines (including the Engine). It is undisputed that IAL had actual knowledge of the existence of the Mortgage when it consummated its purchase of the Engine from Condren.

On August 27, 1985, ATASCO sued Braniff, Condren and IAL for conversion, replevin and forfeiture. In addition to recovery of the Engine and payment of the $135,902 still owing from Northeastern,[1] ATASCO sought punitive damages of $5,000,000.

Concluding that the claims made by ATASCO were in conflict with the 1983 decision of this Court in *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406 (1983), the United States District Court for the Southern District of New York entered summary judgment in favor of all of the defendants and dismissed the Complaint.[2] See Appendix B hereto.

Although the Court of Appeals affirmed the summary judgments in favor of Braniff and Condren, it reversed the judgment in favor of IAL and ordered the District Court to enter a summary judgment in favor of ATASCO as against IAL. According to the Court of Appeals, ATASCO's Mortgage was not valid against Condren because he had purchased without actual or constructive knowledge of its existence, but, by filing the Mortgage with the FAA after Condren had purchased and granted an option to IAL, ATASCO could prevent Condren from conveying good title to IAL (or to anyone else). In so holding, the Court of Appeals relied on various Sections of the New York Uniform Commercial Code which, in its view, entitle the holder of an unrecorded mortgage in an aircraft engine, by filing after an innocent third party purchased the engine without actual notice of the mortgage, to recover against a subsequent purchaser from the innocent third party even though the subsequent purchaser in

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1 Northeastern had paid all installments due under its purchase money Note through January 10, 1985. By the time of suit Northeastern was in bankruptcy and was not joined as a defendant.

2 Shortly after the Complaint was filed, Pride Air, Inc., a lessee of IAL who was also originally named as a defendant, filed for bankruptcy and was effectively dropped from the action.

turn will have a claim against the innocent third party for breach of warranty of title. See Appendix A hereto.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *PHILKO AVIATION, INC. v. SHACKET*, 462 U.S. 406 (1983)

In *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406 (1983), this Court held (per Justice White),

> ". . . that state laws allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are preempted by the federal [Aviation] Act." (462 U.S. at 412)

That holding was expressly premised on recognition of the fact that

> ". . . the primary congressional purpose for the enactment of § 503(c), . . . was to create 'a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft.' "

According to the rationale of the Second Circuit in the present case, even after this Court's decision in *Philko* the Shackets could have recorded their bill of sale and thereafter obtained summary judgment on a conversion claim against any subsequent purchaser of the aircraft from Philko Aviation (or from whoever owned the Aircraft when the Shackets ultimately recorded). There is nothing in this Court's opinion in *Philko* to support the conclusion impliedly reached by the Second Circuit in the present case that, simply by filing their bill of sale with the FAA after Philko Aviation's purchase (even after the decision of this Court), the Shackets could have prevented Philko Aviation from ever selling, leasing or mortgaging the

aircraft, and would have effectively obtained the relief to which this Court said the Shackets were not entitled.[3]

Indeed, such a result would turn the *Philko* decision into an exercise in statutory interpretation having no significance for those who plan commercial transactions in reliance upon the federal recording statute. As the District Court in the present case observed:

> "Following the logic of [*Philko*], it would make no sense for Congress to have established such a [central] registry if someone with an unfiled security interest could come along years after the interest was created, and after subsequent purchasers had relied upon the absence of any adverse claims on file with the FAA, and nevertheless succeed in asserting a priority interest in an aircraft or its parts." (Appendix B at p. 5b)

By holding that ATASCO may recover against IAL because ATASCO recorded before IAL completed its purchase, the Court below effectively made the Mortgage "valid" against Condren because it disabled him from passing good title to anyone and, through IAL's claim against him for breach of warranty of title, made him liable for Northeastern's debt to ATASCO. Thus, Condren's search of the FAA records before purchasing the aircraft served no purpose.

Insofar as Condren would have a claim over against Braniff for breach of its warranty of title, the Second Circuit's decision would also effectively nullify Braniff's reliance upon the fed-

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3 It has long been the law that "title" includes the right to transfer whatever it is the title-holder has, and that "marketable title" includes the right to transfer free of encumbrances. See, *Trimboli v. Kinkel*, 226 N.Y. 147, 152, 123 N.Y. 205 (1919); *General Motors Acceptance Corp. v. Raz Delivery, Inc.*, 238 App. Div. 277, 264 N.Y.S. 412 (4th Dept. 1933). If, as the Second Circuit held, belated recording of a security interest in aircraft can become enforceable against the transferee of an innocent purchaser of title to that aircraft, the security interest encumbers the title of the innocent purchaser and is "effectively valid" against him as well.

eral recording structure as it would retroactively encumber what Braniff had believed was a marketable title.

In short, if the decision of the Second Circuit stands, airlines, financial institutions and others who purchase or finance the purchase of aircraft in reliance upon the integrity of the FAA recording process can never be certain that the absence of encumbrances on the FAA records actually means that the title or interest being acquired will prove to be unencumbered at the time a subsequent transfer is attempted.

In construing the word "until" in Section 403(c) to permit holders of unrecorded interests in aircraft and aircraft engines, by late filing, to retroactively encumber marketable title previously obtained by persons who checked the FAA records and purchased aircraft or engines without knowledge of any prior claim, the Second Circuit prevented achievement of the Congressional purpose upon which *Philko* was premised.

If, as the Court below held, the word "until" in Section 403(c) means that the holder of an unrecorded interest in aircraft or aircraft engines will become entitled to possession or damages for conversion against anyone who purchases the aircraft or engines after the interest is recorded, even if it is years after the interest was created and there have been intervening bona fide purchasers, those who obtain interests in aircraft would have little need or incentive to promptly record. Indeed, since their causes of action against persons purchasing *after* the interest has in fact been filed would not accrue until *after* the filing has been accomplished, the Statute of Limitations would not begin to run until *after* the filing, and expeditious recording would not even be encouraged by the potential running of such a Statute.

In this respect, the Second Circuit's interpretation of the statute disregarded the import of this Court's observation in *Philko* that a definition not be read "mechanically into § 503(c) [where] to do so would render the recording system ineffective and thus would defeat the purpose of the legislation." (462 U.S. at 412)

A post-*Philko* decision by the Court of Appeals for the Third Circuit reinforces the conclusion that the decision of the Second Circuit in the present case was erroneous. In *South Shore Bank v. Tony Mat, Inc.*, 712 F.2d 896 (3d Cir. 1983), a lender, who had loaned without notice of an unrecorded conveyance and had promptly recorded its security interest, was held entitled to prevail against the transferee under the prior conveyance, even though that conveyance was recorded with the FAA while the action was pending. As the Third Circuit noted, "Tony Mat's belated compliance with Section 503 does not alter the result reached by the district court" [summary judgment in favor of the lender] (712 F.2d at 998). The reference in *Tony Mat* to the implications under Massachusetts law of the eventual recording by Tony Mat does not justify the Second Circuit's conclusion that State law may allow a belatedly-recorded mortgage or title to prevent the innocent purchaser of title, who did not have notice of the unrecorded interest, from conveying good title without exposing his purchaser to liability for conversion, replevin or foreclosure, and himself to liability for breach of warranty of title.[4]

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4 Reliance of the Court below on applicability of New York law in this case to determine "priorities" is misplaced: the question raised by the conflict between Condren's *title* and ATASCO's *lien* related to the *existence* of Condren's interest (i.e. did he obtain unencumbered "title"), not to "priorities" between coexisting interests. By definition full title, to be "marketable", "is free from encumbrances and any reasonable doubt as to its validity, and such as a reasonably intelligent person, who is well informed as to facts and their legal bearings, and ready and willing to perform his contract, would be willing to accept in exercise of ordinary business prudence. . . . Such a title as is free from reasonable doubt in law and in fact; not merely a title valid in fact, but *one which readily can be sold or mortgaged to a reasonably prudent purchaser or mortgagee . . .*" *Black's Law Dictionary*, p. 875 (5th ed. 1979) (emphasis added). By definition, a title that can readily be sold to a reasonably prudent purchaser must be superior to the rights of lien-holders whose interests would prevent unencumbered resale. Thus, a mortgage on property that is "subordinate" to the rights of a holder of "marketable" title to that property is a contradiction in terms: an interest that would impair resale cannot exist if it is "subordinate" to the title its existence would encumber.

Similarly, the decisions of State Courts in *South Shore Bank v. Johnson Hydraulic Mfg. Co.*, 131 Ill. App. 3d 1024, 477 N.E.2d 1 (1985) and *Bank of Honolulu v. Davis*, 709 P.2d 613 (Intermed. Ct. App. 1985) interpret *Philko* to require the result reached in the present case by the District Court, not by the Second Circuit. The question as stated by the Illinois Court in *Johnson Hydraulic* was

> "Whether a federally recorded security interest in an airplane is superior to the interest of a prior buyer of the same airplane in the ordinary course of business who first attempts to record the transfer of title fourteen months after the security interest is recorded." (477 N.E.2d at 1)

In disposing of this question, the Court expressly recognized that it was confronted by the issue this Court did not reach in *Philko*—"whether State law determines priorities of conflicting interests in aircraft where both the security interest and the purchaser's interest are federally recorded." (477 N.E.2d at 3)

Citing *Philko*, and realizing that to permit a belated federal recording of full title to have any effect vis-a-vis the prior recorded security interest

> "Would defeat the primary congressional purpose for enacting the federal recordation statute, *i.e.*, 'to create a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claim against, or liens, or other legal interests in an aircraft' " (477 N.E.2d at 4),

the Illinois Court held as a matter of preemptive federal law "that the belated 'recording' in this case was a nullity" against a prior recorded lien. If a subsequently-recorded *full title* is a "nullity" against a prior recorded *lien*, and is not merely "subordinated" to that lien, *a fortiori* the subsequently-recorded lien in the present case should be a "nullity" against a prior recorded marketable title which, by definition, may not be subordinated to the lien and still be "marketable" title.

In the *Bank of Honolulu* case, the Hawaii Court ruled, relying on *Philko*, that

> "Cacho's failure to register his title to the aircraft for at least two full years before Pamela, without actual notice of the conveyance, levied execution to satisfy her judgment against Daniel, is fatal to Cacho's ownership interest, being unrecorded at the time Pamela levied on the aircraft, was invalid as to her and could not operate to cut off her right to levy on the aircraft. *Philko Aviation, supra.* . . ."

Since Pamela's levy necessarily involved a transfer of title to the aircraft with actual knowledge of Cacho's unrecorded title, the decision of the Court implicitly rejected the position adopted by the Second Circuit in the present case—that, after an unrecorded interest in aircraft has been extinguished by the transfer of a conflicting interest to an innocent third party for value, it may nonetheless be resurrected by subsequent constructive or actual notice to the potential transferee of the innocent third party.

The conflict between the decision of the Court below and this Court's decision in *Philko* justifies the grant of certiorari to review to judgment below.

2. THE DECISION BELOW JEOPARDIZES THE INTEGRITY OF THE FEDERAL SYSTEM FOR CENTRALLY RECORDING INTERESTS IN AIRCRAFT AND AIRCRAFT ENGINES.

As a result of the decision of the Court below Condren will have to pay to ATASCO the amount of Northeastern's indebtedness that was secured by the Mortgage, even though Condren checked the appropriate FAA records before he purchased the aircraft and found no record of ATASCO's lien. The fact that the Court below held that Condren could not be liable directly to ATASCO does not preserve the integrity of the recording structure. If, by recording *after* Condren purchased, ATASCO became entitled to replevin the Engine or to recover

the value of its interest from anyone to whom Condren might sell the Engine with a warranty of title, Condren did not in fact obtain "marketable" title to the Engine. Thus, his search of the FAA records proved to be pointless and his expectations, reasonably generated by that search, were frustrated.

In so ruling that ATASCO's belated recording may encumber Condren's title the Court below defeated "the primary congressional purpose for the enactment of § 503(c), which was to create a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft." *Cf. Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 411 (1983). The rule adopted by the Second Circuit—which allows the holder of an unrecorded interest in aircraft or aircraft engines to prevail over anyone who purchases after an untimely recording notwithstanding the number of innocents in the chain of title who purchased prior to such filing—effectively eliminates any need or incentive to record interests promptly and "thereby prevent[s] the 'central clearing house' from providing 'ready access' to information" about the quality of aircraft titles. As the Court observed in *Philko*, "this is not what Congress intended." (462 U.S. at 411).

The suggestion in the Second Circuit's Opinion that affirmance of the District Court judgment in favor of IAL "would discourage lenders from taking security interests and would thereby inhibit commerce" (Appendix A at p. 16a) disregards judicially noticeable commercial realities. According to the Court below, the "rule" urged by IAL would enable a buyer under a purchase-money security interest to cut off the rights of the secured party by reselling immediately—before the secured party might have an opportunity to record. In fact, it is common knowledge that those who are regularly engaged in the financing of aircraft purchases have a representative present at the FAA office at the time the transaction is consummated to ensure that the appropriate documents are filed immediately.

Indeed, by holding that a review of FAA records will never enable a purchaser or lender to learn with certainty that its interest will not be encumbered by unrecorded interests, it is the decision of the Court below that will discourage lenders from taking security interests in aircraft and will thereby inhibit commerce.

The judgment and opinion of the Court below has engendered uncertainties concerning aircraft titles and concerning the significance of the federal recording system and will inevitably affect millions of dollars of aircraft sales and financings. Thus, the Court below has decided an important question of federal law which should be settled by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JEFFREY A. FILLMAN
Box 465
Lakeville, Connecticut 06039
(203) 435-2924

Counsel for Petitioners

August 18, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 807—August Term, 1986

(Argued: February 13, 1987 Decided: May 22, 1987)

Docket No. 86-7981

AIRCRAFT TRADING AND SERVICES, INC.,

Plaintiff-Appellant,

— against —

BRANIFF, INC., WILLIAM CONDREN, INTERNATIONAL AIR LEASES, INC., PRIDE AIR, INC.,

Defendants,

BRANIFF, INC., WILLIAM CONDREN, INTERNATIONAL AIR LEASES, INC.,

Appellees.

Before:

FEINBERG, *Chief Judge,* PIERCE and MINER,

Circuit Judges.

Appeal from summary judgment entered in the United States Disrict Court for the Southern District of New York (Goettel, J.) rejecting claims asserted by plaintiff predicated on chattel mortgage covering a jet aircraft engine. Recorded as required by the Federal Aviation Act before sale of the engine to defendant International Air Leases, Inc., but after intermediate sales to other defendant purchasers, the mortgage was held ineffective as to all defendants.

Reversed and remanded as to defendant International Air Leases, Inc.

DONALD S. ZAKARIN, New York, NY (David Nicholas, Pryor, Cashman, Sherman & Flynn, New York, NY, of counsel) *for Plaintiff-Appellant.*

RICHARD M. KRAVER, New York, NY (Lewis S. Fischbein, Kraver & Parker, New York, NY, of counsel) *for Defendant-Appellee* Braniff, Inc.

(Jeffrey A. Fillman, Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, New York, NY, of counsel) *for Defendants-Appellees* William Condren and International Air Leases, Inc.

MINER, *Circuit Judge*:

Plaintiff-appellant Aircraft Trading and Services, Inc. ("ATASCO") appeals from a judgment entered in the

United States District Court for the Southern District of New York (Goettel, J.) in favor of defendants-appellees Braniff, Inc., William Condren, and International Air Leases, Inc. ("IAL"), following ATASCO's motion for summary judgment against IAL only and defendants' cross-motion for summary judgment. ATASCO's action arose out of its sale of a jet aircraft engine, subject to a chattel mortgage that secured the payment of the purchase price, to Northeastern Airlines. ATASCO failed to record the chattel mortgage with the Federal Aviation Administration ("FAA"), as required for perfection of its security interest under the Federal Aviation Act, 49 U.S.C. §§ 1403-1406 (1982 & Supp. III 1985) ("the Act"), until after the engine had been conveyed by Northeastern to Braniff, and then by Braniff to Condren, culminating in a lease from Condren to IAL with an option to purchase. IAL subsequently exercised its option to buy after ATASCO recorded its interest and after IAL had actual notice of ATASCO's security interest in the engine. ATASCO brought suit for conversion, replevin and forfeiture of the engine, claiming that its rights were superior to those of Braniff, Condren, and IAL.

The district court denied ATASCO's motion for summary judgment against IAL and granted defendants' cross-motion for summary judgment, finding that the intermediate transfers of the engine, prior to ATASCO's perfection of its security interest, extinguished ATASCO's security interest under 49 U.S.C. § 1403(c). On appeal, ATASCO asserts that its interest in the engine is superior to IAL's under U.C.C. Article 9. We find merit in ATASCO's claim and reverse the denial of ATASCO's motion for summary judgment against IAL. We affirm the grant of defendants' cross-motion for summary judgment as to Braniff and Condren, but reverse as to IAL.

BACKGROUND

In December 1982, ATASCO, a Panamanian company engaged in the business of selling and leasing aircraft and aircraft engines, sold a jet aircraft engine to Northeastern Airlines ("Northeastern"), a commercial airline carrier. The purchase price of the engine was $412,344.00. The sales agreement provided that Northeastern would pay ATASCO $36,000.00 as a down payment, with the balance to be paid in 36 equal installments of $10,454.00, due monthly, beginning in March 1983. Northeastern's obligation to pay the debt was secured by a chattel mortgage dated December 31, 1982, held by ATASCO. The chattel mortgage provided that Northeastern would be in default if it (1) failed to pay any note when due; (2) disposed of the engine before all payments were made; or, (3) was subject to bankruptcy proceedings.

Northeastern paid the monthly installments on the engine through January 10, 1985, but has made no payments since then, and is now in bankruptcy. The balance due on the engine is $135,902.00 plus interest. ATASCO failed to record the chattel mortgage with the FAA, as required under 49 U.S.C. § 1403(c), until March 1985.

On November 28, 1984, Northeastern agreed to sell the aircraft containing the engine subject to ATASCO's chattel mortgage to Braniff, a commercial airline carrier. Northeastern, in its bill of sale to Braniff, represented that it was conveying good and marketable title for both the aircraft and the engine. Braniff, which was planning to sell this aircraft immediately to William Condren, a private individual, checked the FAA records for prior claims or liens upon the aircraft or its parts, and found no record of any incumbrances. After the sale to Braniff was consummated, Braniff filed the bill of sale with the FAA on

November 30, 1984. On December 7, 1984, Braniff sold the aircraft to Condren after Condren also checked the FAA records for a prior claim. Condren subsequently filed his bill of sale.

In early February 1985, Condren leased the aircraft, with an option to buy, to IAL. The lease was not filed with the FAA as required by 49 U.S.C. § 1403. ATASCO finally filed its chattel mortgage with the FAA in March of 1985. In April of 1985, IAL learned of ATASCO's chattel mortgage when Condren notified IAL of ATASCO's interest by letter. Nevertheless, in late July or early August of 1985, after procuring a copy of ATASCO's chattel mortgage directly from the FAA, IAL exercised its option to buy the aircraft. That bill of sale was filed with the FAA on August 5th.

ATASCO brought suit for conversion, replevin, and forfeiture against Braniff, Condren and IAL. ATASCO's central contention before the district court was that its rights were superior to those of IAL because its chattel mortgage was filed prior to IAL's filing, and IAL had actual knowledge of the terms of the instrument when it exercised its option to purchase. The district court granted summary judgment in favor of IAL, Condren, and Braniff, noting that if the only transaction at issue were the sale to IAL, then ATASCO might prevail. However, the district court ruled that, because of the intermediate transfers to Braniff and Condren prior to ATASCO's filing of the chattel mortgage, Braniff received good title and passed good title to Condren, who in turn passed good title to IAL.

DISCUSSION

A. *The Federal Aviation Act*

Under the Federal Aviation Act, an interest in aircraft or aircraft engines, including a chattel mortgage, *see* 49 U.S.C. § 1403(a), is not valid against an innocent third party[1] "until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation." 49 U.S.C. § 1403(c). Federal law thus requires recordation with the FAA to perfect a security interest in an aircraft engine. The district court, relying on the language and purpose of 49 U.S.C. § 1403, concluded that Congress must have intended intervening conveyances to render invalid the late recordation of a security interest in an aircraft engine. Therefore, the court denied plaintiff's motion for summary judgment and granted defendants' cross-motion for summary judgment.

The district court interpreted section 1403(c) of the Act to mean that a security interest in an aircraft engine is void unless filed with the FAA before the engine is conveyed again. This reading misinterprets the phrase "*until* such conveyance or other instrument is filed," 49 U.S.C. § 1403(c) (emphasis added). The district court's construction effectively replaces "until" with "unless," and reads into the statute a timely filing requirement. "The use of the word 'until' . . . rather than 'unless' indicates that mere delay . . . [is] not enough to cause forfeiture." *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 39 (1939) (rejecting argument that failure promptly to register copyright precluded infringement claim, where Copy-

[1]Section 1403(c) invalidates an unfiled interest in an aircraft as against "any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any other person having actual notice thereof. . . ." 49 U.S.C. § 1403(c).

right Act of 1909 provided that no action could be maintained "until" registration requirements were complied with).

The purpose of section 1403 is "to create 'a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft.' " *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 411 (1983) (quoting Hearings on H.R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 2d Sess. 407 (1938) (testimony of F. Fagg, Director of Air Commerce, Dep't of Commerce)). Guided by this statement, the Supreme Court ruled that section 1403 preempts state laws that allow unrecorded interests in aircraft to affect innocent third parties. *Philko Aviation*, 462 U.S. at 412. The district court, relying on this language, stated that

> it would make no sense for Congress to have established such a registry if someone with an unfiled security interest could come along years after the interest was created, and after subsequent purchasers had relied upon the absence of any adverse claims on file with the FAA, and nevertheless succeed in asserting a priority interest in an aircraft or its parts.

The district court's conclusion ignores both the Supreme Court's limitation on the Act's preemption of state law, and section 1406 of the Act. Section 1406 provides that "[t]he validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State . . . in which such instrument is delivered." 49 U.S.C. § 1406. Under the plain language of this section, state law determines validity. Citing with favor *In re Gary Aircraft Corp.*, 681 F.2d

365 (5th Cir. 1982) (rejecting contention that section 1403 preempts *all* state laws dealing with priority of interests in aircraft), *cert. denied,* 462 U.S. 1131 (1983), the Supreme Court in *Philko Aviation* concluded:

> *Although state law determines priorities, all interests must be federally recorded before they can obtain whatever priority to which they are entitled under state law.* As one commentator has explained: "The only situation in which priority appears to be determined by operation of the [federal] statute is where the security holder has failed to record his interest. Such failure invalidates the conveyance as to innocent third persons. But recordation itself merely validates: it does not grant priority." Scott, Liens in Aircraft: Priorities, 25 J. Air L. & Commerce 193, 203 (1958) (footnote omitted).

Philko Aviation, 462 U.S. at 413 (emphasis added). *See also Haynes v. General Electric Credit Corp.,* 582 F.2d 869, 870 (4th Cir. 1978) (per curiam) (Act does not preempt U.C.C. rule that buyer in ordinary course of business takes free of a security interest created by his seller); *Sanders v. M.D. Aircraft Sales, Inc.* 575 F.2d 1086, 1088 (3d Cir. 1978) (same); R.A. Anderson, *Anderson on the U.C.C.* § 9-104:12, at 537-38 (3d ed. 1985). We note that resort to state law for priority rules avoids the need for a separate federal priority system for aircraft.

Under the teaching of *Philko Aviation,* the first to perfect by filing with the FAA is not necessarily assured priority. *Philko Aviation,* 462 U.S. at 413. Rather, because section 1403 requires recordation to validate or perfect the security interest, federal law will only determine priority where the security holder has *not* recorded his interest. *Id.* An interest that intervenes before a creditor perfects

under section 1403 does not necessarily extinguish the creditor's subsequently recorded security interest. In such a situation, a court must look to state law to determine priority. *See South Shore Bank v. Tony Mat, Inc.*, 712 F.2d 896, 899 (3d Cir. 1983) (state law determines priority where buyer of airplane eventually recorded ownership with FAA after bank with intervening security interest brought suit).

In the case before us, although both Braniff and Condren purchased the engine and filed with the FAA prior to the time that ATASCO filed and perfected its interest,[2] ATASCO eventually did file and perfect in March of 1985. Therefore, state law determines priority as between ATASCO and Braniff and Condren, and as between ATASCO and IAL. All parties concede that New York's Uniform Commercial Code applies to determine priority in this case. We therefore turn to an analysis of the New York U.C.C., particularly Article 9, to determine how ATASCO's late perfected security interest should be treated.

B. *The Uniform Commercial Code*

1. *Buyer in the Ordinary Course of Business*

Appellees contend that, under New York's Uniform Commercial Code section 9-307(1), Braniff was a buyer in the ordinary course of business who could subsequently convey the engine free of ATASCO's security interest. Section 9-307 provides:

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[2]The date of perfection of a security interest in aircraft generally is held to coincide with the date that the security interest is filed for recordation. *In re Gelking*, 754 F.2d 778, 780 (8th Cir.), *cert. denied*, 105 S. Ct. 3529 (1985).

> (1) A buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

N.Y.U.C.C. Law § 9-307(1) (McKinney 1964). It generally is recognized that the purpose of section 9-307(1) is to protect the buying public where the secured party finances inventory that is sold to the public by the debtor in the regular course of the debtor's business. J. White & R. Summers, *Uniform Commercial Code* § 25-13, at 1067 (2d ed. 1980); N.Y.U.C.C. Law § 9-307 practice commentary 1 (McKinney 1964).

Under section 9-307(1), if Braniff were a buyer in the ordinary course of business, it would "take free" of the security interest created by its seller, Northeastern, extinguishing ATASCO's interest, whether or not ATASCO subsequently perfected. Section 9-307(1) thereby provides an exception to the general rule, codified in section 9-306(2), that "a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party." N.Y.U.C.C. Law § 9-306(2) (McKinney Supp. 1987).

A buyer in the ordinary course of business is defined as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods *buys in ordinary course from a person in the business of selling goods of that kind*. . . ." N.Y.U.U.C. Law § 1-201(9) (McKinney Supp. 1987) (emphasis added). This definition requires, *inter alia*, that the buyer in ordinary course buy from a seller who ordinarily sells similar goods. ATASCO argues that Northeastern, an airline carrier, was not in the busi-

ness of selling airplanes, and therefore Braniff was not a buyer in the ordinary course of business. Appellees counter that it is a practice in the airline industry for airlines periodically to sell off airplanes and therefore Northeastern sold the plane to Braniff in the ordinary course of business.

Northeastern evidently was selling jets and engines to upgrade its fleet, which may be a practice in the industry. However, under New York law, whether a sale is an ordinary sale of similar goods turns on whether the goods sold are classified as capital equipment or as inventory. In *Hempstead Bank v. Andy's Car Rental Sys.*, 35 A.D.2d 35, 312 N.Y.S.2d 317 (2d Dep't 1970), the court held that a rental company's used car sales were not in the ordinary course of business, even though such sales are common in the industry, because the used cars were capital equipment of the leasing company and not inventory. *Accord Sindone v. Farber,* 105 Misc. 2d 634, 432 N.Y.S.2d 778 (Sup. Ct. 1980). IAL's reliance on *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 39 N.Y.2d 632, 350 N.E.2d 590, 385 N.Y.S.2d 260 (1976), is misplaced. In *Tanbro Fabrics* the unfinished textiles sold off by a converter were inventory and not capital equipment. Therefore, the sale was in the ordinary course of business, a result that accords with the *Hempstead Bank* holding. *See* 69 Am. Jur. 2d *Secured Transactions* § 469, at 328 (1973) ("a buyer of collateral that is classified as equipment will rarely if ever be a buyer in ordinary course of business, even where the debtor makes it a regular practice to sell used or obsolescent equipment at regular intervals").

Northeastern's aircraft and engines clearly were capital equipment. *See* N.Y.U.C.C. Law § 9-109(2) (McKinney 1964). Therefore, we hold that the sale to Braniff was not

in the ordinary course of business, and section 9-307(1) does not extinguish ATASCO's security interest. We note that neither Condren nor IAL attempts to establish status as a buyer in the ordinary course of business. Even if Condren or IAL qualified as a buyer in the ordinary course of business, however, they would be unable to avail themselves of section 9-307(1) protection because section 9-307(1) applies only to security interests created by the buyer's seller. Here, Northeastern created the security interest and therefore Braniff was the only party in a position to invoke section 9-307(1) in its own right.

2. *Priority Between ATASCO and Braniff & Condren*

We now turn to a determination of the strength of ATASCO's claim as against Braniff and Condren. Section 9-301(1) provides that:

> (1) an unperfected security interest is subordinate to the rights of
>
> . . .
>
> (b) a person who becomes a lien creditor before the security interest is perfected;
>
> (c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other *buyer not in ordinary course of business* . . . to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected.

N.Y.U.C.C. Law § 9-301(1) (McKinney Supp. 1987) (emphasis added). Both Braniff and Condren bought without knowledge of ATASCO's security interest and before it was perfected. Therefore, as buyers not in the ordinary

course of business, their respective rights to the engine were superior to ATASCO's, by application of section 9-301(1)(c).

It is critical to note for the discussion that follows that ATASCO's unperfected security interest, though subordinate, continued to exist. Section 9-301(1) explicitly provides that "an unperfected security interest *is subordinate*" to the rights of certain buyers and lien creditors. The language of subordination indicates that the secured party's rights live on, although junior to the buyer's rights. Contrast the language of section 9-307—"[a] buyer in ordinary course . . . *takes free* of a security interest created by his seller"—which terminates the secured party's interest for all time. Some courts seemingly ignore the subordination language of section 9-301(1) and state that a senior buyer "takes free" of an unperfected security interest, *see, e.g., United States v. Handy & Harman,* 750 F.2d 777, 780-81 (9th Cir. 1984); *In re Miguel,* 30 Bankr. 896, 898 (Bankr. E.D. Cal. 1983), but those cases do not involve subsequent buyers and apparently use the phrases "takes free" and "has priority over" interchangeably. One commentator has suggested that the U.C.C. drafters intended that an unperfected security interest terminates upon subsequent sale of the collateral to a buyer not in the ordinary course of business, but that an unperfected security interest subject to a senior lien continues. D.G. Carlson, *Death and Subordination Under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors,* 5 Cardozo L. Rev. 547, 553-57 (1984). We decline, however, to interpret section 9-301(1) in a manner that would give "subordinate" two different meanings in the same sentence depending upon the particular subsection that is relevant to the case at bar—section 9-301(1)(c) (buyers not in the ordinary course of business) or section

9-301(1)(b) (lien creditors). Rather, we are convinced that a plain reading of the statute requires that "subordinate" be given consistent meaning within section 9-301, and that the difference in phrasing between sections 9-301(1) ("is subordinate" and 9-307 ("takes free") is to be given effect, notwithstanding cases that use language of termination interchangeably with language of subordination.

3. *Shelter Provision of Article 2, Sales*

Appellees argue that if Braniff and Condren are buyers not in the ordinary course of business, their priority over ATASCO's security interest under section 9-301(1) would pass to IAL with the conveyance. Relying on the shelter provision of Article 2, Sales, section 2-403, appellees assert that Braniff conveyed title to Condren, and Condren conveyed that title to IAL, subject at most to ATASCO's subordinated unperfected security interest. Section 2-403 provides that:

> (1) [a] purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased.

N.Y.U.C.C. Law § 2-403(1) (McKinney 1964). Appellees have directed us to no authority for their assertion that the shelter provision of Article 2 may be applied to immunize transferees from a buyer who is protected under section 9-301(1)(c). It is a novel theory that we believe must fail.

Appellees' reliance on *In re Gary Aircraft Corp.*, 681 F.2d 365 (5th Cir. 1982), is misplaced. In *Gary Aircraft*, the secured party contended that it was entitled to possession of an aircraft because the last purchaser in the chain of sale was not a purchaser for value without notice, and

therefore could not escape the secured party's interest as a buyer in the ordinary course of business. Rejecting that analysis, the Fifth Circuit held that the last purchaser was not subject to the secured party's interest because an intervening purchaser qualified under section 9-307 as a buyer in the ordinary course of business. That special status of the intervening purchaser extinguished the security interest in the collateral such that a subsequent sale could not resurrect it, and the last purchaser therefore prevailed.

New York law is in agreement. *See Marine Midland Bank, N.A. v. Smith Boys, Inc.*, 129 Misc. 2d 37, 41, 492 N.Y.S.2d 355, 358 (Sup. Ct. 1985) (if any party in the chain of title takes free of the security interest under section 9-307, "all succeeding buyers likewise take free of the security interest"). However, this is a narrow exception to the general rule stated in section 9-306(2) that a security interest in collateral continues upon the sale of the collateral unless the sale was authorized by the secured party. *Id.* at 43, 492 N.Y.S.2d at 360. The case before us does not fall within this narrow exception because ATASCO's security interest was not extinguished, but merely subordinated, by the sale to Braniff: Braniff did not "take free" of ATASCO's interest under section 9-307; it took subject to ATASCO's subordinated claim. *See* T.M. Quinn, *Uniform Commercial Code Commentary and Law Digest* ¶ 9-306[A][2], at 9-169 (1978) ("[A]nyone dealing with the collateral deals with it subject to the continuing security interest.").

As the Fifth Circuit recognized in *Gary Aircraft*, "the rule is that section [2-403(1)] is not available to save one who buys when the seller's title is subject to a security interest but who does not qualify under section [9-307]" for preferred status as a buyer in the ordinary course of

business.[3] *Gary Aircraft*, 681 F.2d at 377. *See Commercial Credit Equipment Corp. v. Bates*, 159 Ga. App. 910, 285 S.E.2d 560 (1981). *But see Executive Financial Services, Inc. v. Pagel*, 238 Kan. 809, 715 P.2d 381 (1986) (buyer in the ordinary course of business may prevail on "entrustment" theory under section 2-403(2) and (3) even though he could not prevail under section 9-307(1)). Similarly, in *National Shawmut Bank v. Jones*, 108 N.H. 386, 388, 236 A.2d 484, 486 (1967), the court recognized section 9-307 as the only provision of Article 9 "under which a buyer of goods can claim to take free of a security interest where a sale, exchange or other disposition of the collateral was without consent of the secured party. . . . Article 9-306(2) gives the court no leeway to create any other exceptions to its dictates." *Accord Matteson v. Harper*, 297 Ore. 113, 117, 682 P.2d 766, 769 (1984). *See* J. White & R. Summers, *Uniform Commercial Code* § 25-15, at 1073 (2d ed. 1980).

We find further support for this rule in other sections of the U.C.C. Section 9-306(2) provides for continuance of a security interest upon sale of the collateral "[e]xcept where *this Article* otherwise provides." We interpret this clause as expressly limiting exceptions to those found within Article 9. Moreover, section 2-402(3)(a) specifies that "[n]othing in this Article shall be deemed to impair the rights of creditors of the seller . . . under the provisions of [Article 9]." We conclude that the general scheme of the U.C.C. contemplates that a security interest is to be governed by Article 9, unimpaired by Article 2. *See National Shawmut*, 108 N.H. at 389, 236 A.2d at 486; *J.I. Case Credit Corp. v. Foos*, 11 Kan. App. 2d 185, 188-89,

[3]IAL purchased with knowledge of ATASCO's security interest after ATASCO filed and perfected its claim. Therefore IAL cannot invoke protection in its own right under section 9-301(1)(c).

717 P.2d 1064, 1067 (Kan. Ct. App. 1986); Carlson, *supra*, at 550 n.9 & 556 ("section 2-403 does not contemplate the destruction of unperfected security interests"); Anderson, *supra*, § 9-102:9, at 453. Furthermore, the drafters of the U.C.C. explicitly provided shelter elsewhere in Article 9. *See* N.Y.U.C.C. Law § 9-302(2) (McKinney Supp. 1987) ("If a secured party assigns a perfected security interest, no filing under this Article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor."). "[T]heir failure to do so in section 9-301(1)(c) should be taken as significant." Carlson, *supra*, at 558.

Finally, we note that the U.C.C. does not require a security interest to be filed immediately or promptly, Anderson, *supra*, § 9-302:20, at 77-78, although it is the most prudent course for a cautious lender. Delay in perfection does not preclude perfected status at a later time upon filing. While the secured party's interest may be subordinated to interests of others arising prior to filing, "[h]e can, of course, file, even after a delay, and protect himself against interests arising subsequent to such filing." 53 N.Y. Jur. *Secured Transactions* § 175, at 152 (1967); 69 Am. Jur. 2d *Secured Transactions* § 422, at 271 (1973); Anderson, *supra*, § 9-301:9, at 29-30. The rule appellees urge us to adopt effectively would freeze a secured party's priority status as of the time of the first intervening conveyance: If one failed to file a security interest the day of the sale, the buyer could, by immediately reselling, forever destroy the security interest. While appellees urge that their rule would result in an increment of certainty in such transactions, we believe that such an extreme result would discourage lenders from taking security interests and would thereby inhibit commerce. The U.C.C. does

not attempt to remove all uncertainty from secured transactions. It provides automatic perfection in certain situations, *see* N.Y.U.C.C. Law §§ 9-302(1)(b) (10-day automatic perfection for documents, proceeds), 9-302(1)(d) (purchase money security interest in consumer goods), & 9-304(4) (21-day automatic perfection for certain instruments) (McKinney Supp. 1987), and allows a filing to relate back to the time of attachment in others, *see* N.Y.U.C.C. Law §§ 9-103(1)(d), 9-103(3)(e) (McKinney Supp. 1987) (in multistate transaction, secured party has four months to file in state to which collateral has been removed). The U.C.C. aims to balance the competing concerns of protection for secured lenders and encouragement of trade.

4. *Priority Between ATASCO and IAL*

Having determined that ATASCO's security interest was not extinguished by the subsequent conveyances to Braniff and Condren, we now address the priority in the engine as between ATASCO and IAL.

At the time the engine was conveyed from Northeastern to Braniff and then to Condren, ATASCO's claim was subordinate to Braniff's and Condren's under section 9-301 as discussed above, because it was unfiled and unperfected. However, ATASCO eventually did file and perfect its security interest, and therefore section 9-301, which determines priority where an interest is unperfected, has no bearing on the issue of priority as between ATASCO and IAL, who have competing perfected interests in the engine.

Section 9-312(5)(a), the catch-all priority section of Article 9, governs conflicts between competing perfected interests:

> Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

N.Y.U.C.C. Law § 9-312(5)(a) (McKinney Supp. 1987). As previously discussed, section 403 of the Federal Aviation Act requires filing with the Secretary of the FAA to perfect an interest in an aircraft engine. Therefore, time of filing is identical to time of perfection in the case before us. Under section 9-312(5)(a), the first to file an interest with the FAA will rank first in priority. It is undisputed that ATASCO filed its chattel mortgage with the FAA in March 1985, and IAL filed its interest on August 5, 1985. Therefore, under the first to file or perfect rule of section 9-312(5)(a), ATASCO's security interest in the engine has priority over IAL's interest. We therefore reverse the district court's grant of summary judgment in favor of IAL and the denial of ATASCO's motion for summary judgment as against IAL, and remand the case for a determination of damages.

C. *Sanctions*

Appellees request that we award double costs and attorney's fees against appellant for bringing an appeal "totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence." As is clear from our discussion of appellant's claims, we are of the view that this appeal was highly meritorious and well supported by relevant law. But even if we are wrong, the issues are obviously not frivolous. Appellees' request for sanctions therefore borders on the frivolous, and we caution that we will not hesitate to

impose appropriate penalties in the future for frivolous requests for sanctions.

CONCLUSION

For the reasons stated above, we reverse the district court's grant of summary judgment in favor of IAL. We affirm the district court's grant of summary judgment for Braniff and Condren, on the grounds herein stated. We reverse the denial of ATASCO's summary judgment motion as against IAL, and remand for a determination of damages and entry of judgment.

APPENDIX B

Transcript of October 3, 1986 Decision by Hon. Gerard L. Goettel, District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 6852 (GLG)

October 3, 1986

AIRCRAFT TRADING AND SERVICES, INC.,

Plaintiff,

—v.—

BRANIFF, INC., WILLIAM CONDREN, NTERNATIONAL AIR LEASES, INC., PRIDE AIR, INC., and CITIBANK, N.A.,

Defendants.

B e f o r e :

HON. GERARD L. GOETTEL,

District Judge.

THE COURT: The following is the opinion of the Court:

This diversity action for conversion, replevin, forfeiture, and punitive damages is brought by plaintiff Aircraft Trading and Services, Inc. (ATASCO) against defendant Braniff, Inc. and others in a chain of sale of a jet aircraft engine.

In December, 1982, ATASCO sold the engine, serial number P655021B, to Northeastern Airlines for $412,344. The sales agreement required a downpayment of $36,000 with the balance to be paid in 36 monthly installments of $10,454 each beginning March 10, 1983. Northeastern executed 36 promissory notes for these payments and a chattel mortgage giving ATASCO a security interest in the engine until all payments were made. The chattel mortgage provided that Northeastern would be in default if it (1) failed to pay any note when due, (2) disposed of the engine before all payments were made, or (3) instituted proceedings in bankruptcy (or had proceedings brought against it).

Pursuant to federal law, this chattel mortgage should have been filed with the Federal Aviation Administration (FAA), but it was not so filed until March, 1985.

Northeastern paid the monthly installments through January 10, 1985, but not thereafter. The balance due is $135,902 plus interest.

Northeastern, at the present time, is in bankruptcy, this occurring shortly thereafter.

On November 28, 1984, Northeastern entered into an agreement to sell an aircraft to Braniff. One of the engines in that aircraft was the one that ATASCO had sold to Northeastern. Northeastern gave Braniff a bill of sale for the aircraft, including engines, that represented that it was conveying good and marketable title. Braniff checked the FAA records to see if there were any prior claims or liens to title upon the aircraft or parts thereof; it found no record of any encumbrances and

therefore consummated the sale with Northeastern. Braniff filed the bill of sale with the FAA on November 30, 1984.

On December 7, 1984, Braniff sold the same aircraft to defendant William Condren for $2,200,000. Condren had been previously negotiating with Northeastern to obtain the plane directly from it. The sale to Condren was prearranged by Northeastern as part of the sale to Braniff, or at least it was Braniff's contemplation that it would be able to resell it to Condren thereafter.

Prior to this sale, both Condren on Braniff had the FAA records searched to be* sure no prior claims were on record relating to the aircraft, its engines, etc. None were found and the sale was finalized. Condren then filed his bill of sale with the FAA.

In early February, 1985 Condren leased the aircraft to defendant International Air Leases, Inc. (IAL). The lease included an option to buy. The lease was not filed with the FAA; such filing is required pursuant to 49 U.S.C. Section 1403 in order to affect rights of third parties.

In March of 1985, after the aircraft had been leased, ATASCO filed its chattel mortgage with the FAA. It was recorded by the FAA on March 29, 1985. IAL learned of the chattel mortgage in April of 1985 when plaintiff's counsel notified Braniff that ATASCO was claiming a security interest in the engine on the plane. In late July or early August of 1985, IAL nevertheless exercised its option to buy the aircraft. The bill of sale for this purchase was filed with the FAA on August 5, 1985.

Plaintiff has moved for summary judgment against defendant IAL on its claim of foreclosure and conversion. Plaintiff concedes that it can only get a single remedy so that success against IAL would conclude this action.

Defendants Braniff, Condren, and IAL oppose plaintiff's motion and cross-move as well for summary judgment in favor of all defendants.

Pursuant to federal law, "any conveyance which affects the title to, or any interest in, any civil aircraft" must be filed with the FAA before it can affect the rights of innocent third party. 49 U.S.C. Section 1403(a)(1) and (c).

The federal statute does not specify any time in which such a document must be filed. It only notes that any such interest in aircraft or engine, etc. is not valid against a third party who has no actual knowledge of the interest or conveyance until filed. 49 U.S.C. Section 1403(c).

Plaintiff alleges that its rights are superior to those of IAL because plaintiff's chattel mortgage was filed prior to IAL's purchase of the aircraft, and IAL had actual knowledge of the terms of that instrument when it exercised its option to purchase.

If the only transaction involved here were the sale to IAL and not the intermediary transfers to Braniff and Condren, the plaintiff might prevail. However, IAL, Condren, and Braniff argue that the plaintiff's rights were extinguished when Braniff obtained title to the aircraft, including its parts and engines, from Northeastern without notice of any prior interest in the jet engine and filed its bill of sale with the FAA. Braniff then passed good title to Condren who passed good title to IAL.

The defendants argue that the plaintiff cannot revive its security interest in the engine by belatedly filing its chattel mortgage after the sales to Braniff and Condren were consummated and properly recorded.

The defendants point out that the purpose of the federal statute requiring filing of any interest in the aircraft "was to create a 'central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal

interests in an aircraft.' " Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 411, (1983) (quoting legislative history of 49 U.S.C. Section 1403).

Following the logic of that case, it would make no sense for Congress to have established such a registry if someone with an unfiled security interest could come along years after the interest was created, and after subsequent purchasers had relied upon the absence of any adverse claims on file with the FAA, and nevertheless succeed in asserting a priority interest in an aircraft or its parts.

A host of other claims and arguments are sprinkled throughout the many briefs submitted in support of and in opposition to the motions and cross motions before us. We do not reach most of them because it is clear that as a matter of law once Braniff and Condren took their interest in the engine without actual notice of the plaintiff's chattel mortgage which had not been properly filed with the FAA, any subsequent sale passed good title to the engine free of plaintiff's initial security interest.

Plaintiff alleges no facts to show that any subsequent purchaser of the engine prior to plaintiff's filing of its security interest with the FAA had actual knowledge of plaintiff's security interest.

The parties have completed discovery in this suit so that facts not presently known to all parties are unlikely to surface at some later time to defeat summary judgment.

In support of its own summary judgment motion and in opposition to defendants' motions, the plaintiff submits affidavits from counsel in which he speculates upon the inferences to be drawn from various documents and events. These allegations are insufficient on a motion for summary judgment to create a factual issue regarding defendants' knowledge of the events in question. See Matsushita Electric Industrial Co. Ltd., et al. v. Zenith Radio Corp., et al. 54 U.S. Law Week 4319

(U.S. March 26, 1986); Celotex Corp. v. Catrett, 54 U.S.L.W. 4775 (U.S. June 25, 1986).

Plaintiff clearly has a claim against Northeastern based upon the latter's default on its promissory notes. However, as noted earlier, Northeastern filed in bankruptcy in January 1985, leaving plaintiff to whatever preference it can claim in the bankruptcy proceedings based upon the unpaid portion of the promissory note in the amount of $135,902 plus interest.

In this proceeding, however, plaintiff's motion for summary judgment must be denied and the defendants' motions granted.

Consequently, this action is dismissed against all defendants.

Supreme Court, U.S.
FILED
SEP 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM CONDREN and INTERNATIONAL AIR LEASES, INC.,
Petitioners,

—and—

BRANIFF, INC.,
Respondent,

—against—

AIRCRAFT TRADING AND SERVICES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BRANIFF, INC. IN SUPPORT OF PETITION

RICHARD M. KRAVER
Kraver & Parker
885 Third Avenue
New York, New York 10022
(212) 751-1414

Counsel of Record for Respondent Braniff, Inc.

Of Counsel:

Lewis S. Fischbein
Kraver & Parker
885 Third Avenue
New York, New York 10022
(212) 751-1414

September 4, 1987

QUESTIONS PRESENTED

Braniff, Inc. ("Braniff") is satisfied with the questions presented by Petitioner; however, it believes they may be framed as one question as follows:

Where a secured creditor fails to perfect its security interest in an aircraft engine by recording its interest with the Federal Aviation Administration in accordance with Section 503(c) of the Federal Aviation Act (49 U.S.C. § 1403(c)) until after a buyer takes without actual or constructive knowledge of that interest, does a subsequent transferee of the collateral who has knowledge take title free of the secured creditor's security interest?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were William Condren ("Condren") and International Air Leases, Inc. ("IAL"), petitioners herein, and Braniff and Aircraft Trading and Services, Inc. ("ATASCO"), respondents herein.[1]

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1 The caption of the case in this Court as set forth on the Petition apparently inadvertently omits Braniff. The parent company of Braniff is Dalfort Corporation. Braniff has no subsidiaries (except wholly owned subsidiaries) or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-306

WILLIAM CONDREN and INTERNATIONAL AIR LEASES, INC.,

Petitioners,

—and—

BRANIFF, INC.,

Respondent,

—against—

AIRCRAFT TRADING AND SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BRANIFF, INC. IN SUPPORT OF PETITION

Respondent Braniff respectfully supports the Petition of Condren and IAL that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 819 F.2d 1227, and the slip opinion is reproduced in Appendix A to the Petition. The opinion of the United States District Court for the Southern District of New York has not been officially reported and is reproduced in Appendix B to the Petition.

STATUTORY PROVISIONS INVOLVED

In addition to those set forth in the Petition:

New York Uniform Commercial Code ("UCC" or "Code"):[2]

Section 1-103	(McKinney 1964)
Section 2-402(3)(a)	(McKinney 1964)
Section 2-403(1)	(McKinney 1964)
Section 3-201(1)	(McKinney 1964)
Section 9-301(1)(c)	(McKinney Supp. 1987)
Section 9-306(2)	(McKinney Supp. 1987)
Section 9-307(1)	(McKinney Supp. 1987)

STATEMENT OF THE CASE

Braniff supplements the statement of the case set forth in the Petition as follows.

It is undisputed that ATASCO had actual knowledge, during the period between its sale of the jet aircraft engine in question (the "Engine") to Northeastern Airlines ("Northeastern") in December 1982 and its filing of the chattel mortgage covering the Engine (the "Mortgage") in March 1985, that the Mortgage had not yet been filed and that it was required to be filed for ATASCO's lien to be perfected.

---

2 The pertinent text is set forth in Appendix A hereto.

The bill of sale which Braniff filed with the Federal Aviation Agency ("FAA") after its purchase of the aircraft containing the Engine from Northeastern was consummated was an instrument by which Northeastern purported to convey to Braniff good and marketable title to the aircraft and engines (including the Engine).

It is undisputed that it is a standard practice in sales of aircraft that sellers provide purchasers with a warranty bill of sale covering the airframe and engines. Purchasers normally do not request proof of current or prior ownership of engines being sold. As Braniff was not informed that any encumbrance created by a prior owner of the Engine existed, it had no reason to request a bill of sale or other document creating the encumbrance from the prior owner. Instead it accepted and received warranties in the bill of sale furnished to it.

Similiarly, the bill of sale which Condren filed with the FAA after his purchase of the aircraft containing the Engine from Braniff was consummated was an instrument by which Braniff purported to convey to Northeastern good and marketable title to the aircraft and engines (including the Engine). Upon IAL's exercise of its irrevocable option to purchase the aircraft containing the Engine from Condren, IAL received a comparable bill of sale from Condren containing a warranty of good and marketable title.

Braniff had, and continues to have, an interest in the disposition of ATASCO's claim against IAL in view of the potential claims by IAL against Condren and Condren against Braniff predicated upon the foregoing warranties of title.[3]

---

3 Braniff maintains that it has affirmative defenses to any such claims. Nevertheless, those affirmative defenses would not have to be litigated if the judgment of the Court of Appeals is reversed against IAL and the judgment of the district court is affirmed.

SUMMARY OF ARGUMENT

If the decision of the Second Circuit stands, the holder of an unrecorded mortgage in an aircraft engine would be rewarded for its delay in filing until after an innocent third party purchased the engine without actual notice of the mortgage. It could recover against a subsequent purchaser from the innocent third party or against remote purchasers years later.

Sales of aircraft and engines typically involve providing warranties of good and marketable title. If the ruling below is left unchallenged, a secured party who belatedly perfects would achieve indirectly what it could not do directly. The secured party would circumvent the protections afforded by a recording statute by reaching one of the innocent third party's transferees, which would trigger successive claims for breach of warranty of title all the way back up the chain of ownership to the innocent third party. Such a result would have a draconian effect on numerous conveyances and should not be sanctioned.

Rather, the interplay of the aircraft recording statute, 49 U.S.C. § 1403, with section 9-301(1)(c) of the Uniform Commercial Code and the "shelter" provision contained in section 2-403(1) of the Code should render the innocent third party and all subsequent transferees not liable to the dilatory secured party.

ARGUMENT

Braniff concurs in the reasons for granting the writ set forth in the Petition. Those reasons will not be reiterated except as appropriate. Braniff will advance additional reasons for granting the writ, including those involving the Uniform Commercial Code.

I. THE WRIT SHOULD BE GRANTED AS THE DECISION BELOW THREATENS THE INTEGRITY OF THE FEDERAL SYSTEM FOR CENTRALLY RECORDING INTERESTS IN AIRCRAFT AND AIRCRAFT ENGINES AS WELL AS SIMILAR RECORDING STATUTES

The importance of the issue presented cannot be overstated. In holding that a secured party, who delays recording until after an intervening innocent purchaser, nonetheless prevails as against a subsequent transferee, the Court of Appeals effectively adopted a rule by which the title of the innocent purchaser may be retroactively impaired and that party exposed to a claim for breach of warranty of title. The innocent purchaser's search of the FAA records—or any comparable central registry—prior to consummating the transaction is thus reduced to an exercise in futility.

Such a rule, if permitted to remain unchallenged, could unsettle countless commercial transactions that depend upon the sanctity of the recording statutes. It would run counter to the primary congressional purpose for the passage of section 503(c) of the Federal Aviation Act of 1958, as amended (the "Act"), 49 U.S.C. § 1403(c), recognized by this Court in *Philko Aviation, Inc.* v. *Schacket*, 462 U.S. 406, 411 (1983):

> ". . . to create 'a central clearing house for recordation of titles so that a person, wherever he may be, will know where he can find ready access to the claims against, or liens, or other legal interests in an aircraft.' "

This case considers the construction and application of the Act. The decision of the Court of Appeals is significant in the administration of the Act—it poses a serious threat to effective administration. Concomittantly, the decision of necessity is of vital concern to the aircraft industry and the lending community, if not also to potential buyers everywhere who depend upon recording statutes for protection. This Court should settle a critical question of first impression decided by the

Second Circuit. For all these reasons, the writ should be granted.

The integrity of the FAA recording system would be severely undermined if the first purchaser following the granting of the security interest could not rely upon the FAA registry as he found it. Any number of sales could occur but title would be forever impaired, if a secured party successfully (by gaining priority) filed before a later sale whether the later sale was the second or the ninety-ninth. Adherence to the reasoning of the Second Circuit would reward a secured party for ignoring the recording statute by neglecting to file promptly, which is "not what Congress intended." *Philko Aviation, Inc.* v. *Schacket*, *supra*. Rather, Congress intended that a transferee look no further than the FAA records "to acquire his interest with the certain knowledge that the transferor's title is clear." *Id.* at n.5 & 413 n.7.

If the "shelter" provision does not apply, a subsequent transferee without knowledge at the time he acquired an aircraft or an aircraft engine (such as Condren), which was prior to the secured party's filing, might be required to operate the aircraft or the engine or keep it in storage forever after, as he could not convey the aircraft or the engine free and clear of liens after the secured party finally filed its interest with the FAA for recordation. This would be an absurd result because of its unsettling implications for conveyances dependent upon recording statutes. Any subsequent conveyance(s) would set in motion claims for breach of warranty of title that would extend back to the first innocent purchaser. That innocent purchaser would be penalized rather than the dilatory secured party who should bear the loss caused by his failure to record promptly. The law cannot permit a result that rewards a wrongdoer for his own wrongdoing.

This Court should not condone a judicial concept of a "springing defect." If the Court of Appeals' rationale is correct, airlines might never be in a position to satisfy potential buyers or lenders that reasonable expectations concerning fu-

ture disposition will not be frustrated by the subsequent filing of an interest that may have been created many years earlier but is unknown to everyone because it was never before recorded. Unless overturned, the judgment against IAL may well lead to just that result.

II. THE APPROPRIATE CONSTRUCTION AND APPLICATION OF THE UNIFORM COMMERCIAL CODE REQUIRE RESORT TO THE SHELTER PRINCIPLE FOR NON-ORDINARY COURSE BUYERS WHERE A CENTRAL RECORDING SYSTEM IS INVOLVED, CONTRARY TO THE DECISION BELOW

The Second Circuit predicated its holding upon its construction and application of various sections of the Uniform Commercial Code. Priority is properly accorded to Braniff, Condren and IAL over ATASCO, however, as a matter of state or federal law once Braniff or Condren purchased the Engine without actual notice of the Mortgage which had not yet been filed with the FAA. In contrast with the Court of Appeals, the district court found that any subsequent sale passed good title to the Engine free of ATASCO's lien. This proposition necessarily follows from common law principles governing passage of title, the Uniform Commercial Code in which those principles are codified or the policy behind the federal recording statute for conveyances of aircraft.

The long-standing principles regarding the passage of title are now codified in section 2-403(1) of the Code. The Court of Appeals' refusal to allow that section or its concept of "shelter" to apply to section 9-301(1)(c) of the Code ignores sound policy reasons behind the necessary interplay of those sections. The free alienability of goods is promoted by protecting innocent buyers and their transferees from the interests of the (unperfected) creditors of their sellers. *Matter of Gary Aircraft Corporation*, 681 F.2d 365, 370 (5th Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983). *Cf. Official Comment* 3 to UCC § 3-201.

The Court of Appeals found Braniff to be a non-ordinary course buyer. Section 9-301(1)(c), however, protects innocent buyers in Braniff's class, who take delivery and give value, from an unperfected security interest. Any such buyer takes good title free of a security interest if it was not perfected at the time of purchase.

The Second Circuit unduly relied on the literal language of section 9-301(1)(c) that the unperfected security interest is "subordinate" to the rights of the innocent purchaser. Section 2-403(1) applies such that subsequent transferees step into the innocent purchaser's shoes, and the unperfected security interest is "subordinate" to their rights as well. Stated differently, a successful section 9-301(1)(c) buyer *is* treated as one who "takes *free* of the [unperfected] security interest." *White Star Distributors, Inc.* v. *Kennedy*, 66 A.D.2d 1011, 411 N.Y.S.2d 751, 752 (4th Dept. 1978) (Emphasis supplied). *Accord*, *United States* v. *Handy and Harman*, 750 F.2d 777, 781, 786 (9th Cir. 1984).

In *Handy and Harman*, the Ninth Circuit stated that the defendant "must fit within one of [section 9-307(1) or section 9-301(1)(c)] in order to take the collateral free of the government's security interest." *Id.* at 781. The court went on to note that, in the case of a successful section 9-301(1)(c) buyer, "the security interest has been cut off," *id.* at 786, and that "[i]n the absence of an enforceable security interest, the usual rules of priority favoring secured parties are inapplicable." *Id.*[4]

The use of slightly different language in section 9-307(1) gave the Court of Appeals considerable though unnecessary pause. As Judge Miner's Opinion recognizes, 819 F.2d at 1233-34, it has been suggested that the draftsmen of the Code nonetheless intended that an unperfected security interest terminates upon subsequent sale of the collateral to a buyer not in

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4 *Cf. South Shore Bank* v. *Johnson Hydraulic Mfg. Co.*, 131 Ill. App. 3d 1024, 477 N.E.2d 1, 4 (Ill. App. 3d Dist. 1985). In *South Shore Bank*, it was held that as against the plaintiff, the rights of the defendant obtained by purchasing an aircraft were "invalidated" by its failure to duly record the transfer documents with the FAA prior to the plaintiff's recordation.

the ordinary course of business, but that an unperfected security interest subject to a senior lien continues. *See* D.G. Carlson, *Death and Subordination Under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors,* 5 Cardozo L. Rev. 547, 551-57 (1984).

To regard the literal language of section 9-301(1)(c) as controlling is to do violence to the time-honored doctrine that secret liens are not favored out of fairness to the innocent buyer. This doctrine "was never based on any distinction between transactions in and out of the ordinary course of business." Carlson, *supra*, at 556. A statutory definition should not be read mechanically where to do so would defeat the purpose of the legislation. *Philko*, *supra*, 462 U.S. at 412.

Section 9-301(1)(c) applies to unperfected security interests, whereas section 9-307(1) applies to perfected security interests. This distinction renders the Court of Appeals' implicit economic analysis of the supposed difference in the protections afforded by section 9-301(1)(c) and section 9-307(1) faulty. Non-ordinary course sales under section 9-301(1)(c) should be afforded the same "blanket" protection afforded ordinary course sales under section 9-307(1), rather than "transactional" protection, because the secured party has not yet perfected and therefore deserves (and should expect) less protection than if he had perfected.

The status of a non-ordinary course buyer vis-á-vis an unperfected security interest should be no different than the status of an ordinary course buyer vis-á-vis a perfected security interest. The Second Circuit therefore placed undue reliance upon section 9-307(1) being the subject of *Gary Aircraft*, *supra*. *See* 819 F.2d at 1234. Official Comment 1 to that section itself notes that "Section 9-301 should be consulted to determine what purchasers, in addition to the buyers covered in this Section, take *free* of an unperfected security interest." (Emphasis supplied).

Section 9-301(1)(c) should not be deemed to take away rights that are conferred under Article 2 of the Code. This is confirmed by section 2-403(1), which provides in pertinent part:

> "A purchaser of goods acquires all title which his transferor had or had power to transfer . . . ."

Section 2-403(1) incorporates "[t]he basic policy of our law allowing transfer of such title as the transferor has." *Official Comment* 1 to UCC § 2-403. The wisdom of the policy embodied in Article 2 of the Code for "Sales" should also be applied with respect to Article 9 for "Secured Transactions." Any other policy would result in the kind of uncertainty and unsettling of vested rights as that encouraged by Judge Miner's erroneous conclusion.

Due to ATASCO's failure to perfect its lien before Braniff purchased the Engine and Braniff's lack of knowledge of the lien, ATASCO's interest in the Engine became subordinate under section 9-301(1)(c) to the rights of Braniff. Pursuant to section 2-403(1), Braniff's subsequent transferees, including Condren and IAL, should acquire Braniff's superior status regardless of the state of their knowledge.

Though the Second Circuit rejected this statutory construction, it effectively received judicial approval in New York in *Williamson* v. *Mason*, 12 Hun. 97, 108-09 (1877):

> "A purchaser with notice will secure a good title by obtaining it from a party who had no notice, and may hold the property bought against the equities of a party otherwise entitled to be regarded as the true owner."

While *Williamson* is a pre-Code decision, its logic remains sound law. *See also General Motors Acceptance Corporation*

v. *Raz Delivery*, 238 A.D. 277, 264 N.Y.S. 412, 415 (4th Dept. 1933);[5] *Official Comment* to UCC § 3-201.[6]

The common law "shelter" principle is codified in section 1-103 ("Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions.") and section 2-403(1). Any argument that section 2-403(1) does not explicitly protect against a security interest must lose its force as section 1-103 may be utilized to reach the same result. *Cf.* J. White & R. Summers, *Uniform Commercial Code* § 3-11, at 140 (2d ed. 1980).

---

5 *Raz Delivery* held that a conditional vendor could not assert a reserved title as against the vendee upon the vendee's reacquiring the property from a purchaser at a trustee's sale after the vendee's discharge in bankruptcy. The conditional vendor's reserved title was held as security only, and its claim as a result of the intervening right of the trustee in bankruptcy was reduced to an unsecured claim against the bankrupt's estate which was discharged in the bankruptcy proceedings.

6 The "shelter" principle is also set forth explicitly in section 3-201(1) with respect to commercial paper: "Transfer of an instrument vests in the transferee such rights as the transferor has therein." The pertinent portions of the Official Comment to that section are illuminating:

> "1. The section applies to any transfer, whether by a holder or not. Any person who transfers an instrument transfers whatever rights he has in it. The transferee acquires those rights even though they do not amount to 'title.'
>
> * * *
>
> "3. A holder in due course may transfer his rights as such. The 'shelter' provision of the last sentence of the original Section 58 is merely one illustration of *the rule that anyone may transfer what he has. Its policy is to assure the holder in due course a free market for the paper*, and that policy is continued in this section. . . . The operation of the provision is illustrated by the following examples:
>
> > (a) *A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes as a holder in due course. After the instrument is overdue B gives it to C, who has notice of the fraud. C succeeds to B's rights as a holder in due course, cutting off the defense.*" (Emphasis supplied).

Section 9-307 should not be construed to afford the sole exception to the general rule stated in section 9-306(2) that a security interest in collateral continues upon the sale of the collateral unless the sale was authorized by the secured party. Section 9-301(1)(c) should be deemed to afford another exception under the analysis set forth above.

Likewise, the prohibition of section 2-402(3)(a) against impairing the rights of secured creditors is not jeopardized by resort to section 2-403(1). Rights are not impaired when they are already lost. Here, ATASCO's loss occurred upon the initial transfer to Braniff pursuant to section 9-301(1)(c). Section 2-403(1), as applied to subsequent transferees, did not "impair" any rights of ATASCO. Those rights were already subordinate to Braniff, and should therefore be subordinate to its transferees, Condren and IAL.

The Second Circuit's reliance upon *National Shawmut Bank* v. *Jones*, 108 N.H. 386, 236 A.2d 434 (1967), to avoid the application of section 2-403(1) is misplaced. *National Shawmut* considered only the second sentence of section 2-403(1)—the "voidable title" provision—and held inapplicable that provision alone. The "voidable title" provision is *not* the portion of section 2-403(1) upon which reliance here is placed. Rather, reliance is placed upon the first sentence of section 2-403(1)—the "shelter" provision.[7]

In quoting *Gary Aircraft*, *supra*, 681 F.2d at 877, the Court of Appeals, 819 F.2d at 1234, omitted the rest of the critical portion of the decision. The missing portion states precisely that the *National Shawmut* rule does *not* preclude the availability of section 2-403(1) to subsequent transferees from a successful section 9-307(1) buyer. *Gary Aircraft* held that section

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7 *Official Comment* 4 to UCC § 2-403 also supports subsection (1)'s application to section 9-301(1)(c). It states:

> *"Except as provided in subsection (1)*, the rights of purchasers other than buyers in ordinary course are left to the Articles on Secured Transactions, Documents of Title, and Bulk Sales." (Emphasis supplied).

2-403(1) is available. 681 F.2d at 877. It should also be available to subsequent transferees from a successful section 9-301(1)(c) buyer.[8]

If a warranty of title is to mean what it says, and not to come back to haunt a prior innocent purchaser who furnished it in good faith, the decision of the Court of Appeals against IAL must be overturned. Otherwise, the dilatory secured party, here ATASCO, is rewarded to the detriment of the innocent purchaser.

Such a result flies in the face of well-established legal principles and is contrary to fundamental policy concerns. The "subsequent perfecting of a security interest can not operate retroactively to impair rights in the collateral acquired by innocent parties for value prior to perfection." R.A. Anderson, *Anderson on the U.C.C.* § 9-301:9, at 29-30 (3d ed. 1985). Though the Code does not attempt to remove all uncertainty from secured transactions, the FAA recording statute does. The Code must be construed in light of that Act if commercial transactions involving aircraft and aircraft engines are to have any sanctity.

---

8 *See* White & Summers, *supra*, § 25-15, at 1074 n.100 (One of the authors disagrees with the other "and would read 2-403 broadly to protect the innocent purchaser."); Carlson, *supra*, at 558 (The argument that there is significance in the failure to provide shelter explicitly in section 9-301(1)(c) "could be countered by contrary evidence, such as a showing that denial of shelter to buyers under section 9-301(1)(c) violates the fundamental philosophy of the UCC priority system." . . . . "Justification . . . exists for the proposition that shelter provisions should be read generously into the UCC wherever necessary to protect the marketability of a senior party's priority.")

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

RICHARD M. KRAVER
Kraver & Parker
885 Third Avenue
New York, New York 10022
(212) 751-1414

Counsel of Record for Respondent Braniff, Inc.

Of Counsel:

Lewis S. Fischbein
Kraver & Parker
885 Third Avenue
New York, New York 10022
(212) 751-1414

September 4, 1987

APPENDIX

APPENDIX A

New York Uniform Commercial Code:

§ 1-103. Supplementary General Principles of Law Applicable

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

§ 2-402. Rights of Seller's Creditors Against Sold Goods

* * *

(3) Nothing in this Article shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the Article on Secured Transactions (Article 9); or

* * *

§ 2-403. Power to Transfer: Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

* * *

§ 3-201. Transfer: Right to Indorsement

(1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

* * *

§ 9-301. Persons Who Take Priority Over Unperfected Security Interests; Right of "Lien Creditor"

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

* * *

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business, or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

* * *

§ 9-306. "Proceeds"; Secured Party's Rights on Disposition of Collateral

* * *

(2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

* * *

§ 9-307. Protection of Buyers of Goods

(1) A buyer in ordinary course of business (subsection (9) of Section 1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

* * *

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM CONDREN and INTERNATIONAL AIR LEASES, INC.,

Petitioners,

—against—

AIRCRAFT TRADING AND SERVICES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEPHEN F. HUFF
Counsel of Record

PRYOR, CASHMAN, SHERMAN & FLYNN
DONALD S. ZAKARIN
DAVID A. NICHOLAS
On the Brief
Counsel for Respondent
410 Park Avenue
New York, New York 10022
(212) 421-4100

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TABLE OF AUTHORITIES

Cases:

Bank of Honolulu v. *Davis*, 709 P.2d 613 (Intermed. Ct. App. 1985) 8, 9

Philko Aviation, Inc. v. *Shacket*, 462 U.S. 406 (1983) 2, 4, 5, 6, 8, 9, 10

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Other Authorities:

Federal Aviation Act; 49 U.S.C. §1403(c) 2, 3, 4, 5, 6, 7, 8, 9

49 U.S.C. §1406 ..... 2, 4, 5, 6, 7, 8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-306

WILLIAM CONDREN and INTERNATIONAL AIR LEASES, INC.,
Petitioners,

—against—

AIRCRAFT TRADING AND SERVICES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the Second Circuit Court of Appeals dated May 22, 1987 is reported at 819 F.2d 1227 and appears at Appendix A of the Petition. The opinion of the United States District Court for the Southern District of New York dated October 3, 1986 has not been officially reported and appears at Appendix B of the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Whether this case presents any question of Federal Law under Sections 503(c) and 506 of the Federal Aviation Act [49 U.S.C. §§1403(c) and 1406], as interpreted by *Philko Aviation, Inc.* v. *Shacket,* 462 U.S. 406 (1983) or, whether this case merely involves questions of state law under the Uniform Commercial Code.

Statutory Provisions Involved

The pertinent provisions of the Federal Aviation Act are set forth in the Petition at pages 2-3. The relevant and controlling provisions of the Uniform Commercial Code have not been set forth in the Petition but are described in detail in the opinion of the Second Circuit Court of Appeals.[1]

Counterstatement of the Case

In December 1982, respondent Aircraft Trading and Services, Inc. ("ATASCO") sold a jet aircraft engine (the "Engine") to Northeastern Airlines ("Northeastern") a United States commercial airline carrier, subject to a chattel mortgage ("Chattel Mortgage") securing the payment in full by Northeastern of the purchase price. The Chattel Mortgage, which Northeastern was obligated to file with the Federal Aviation Agency ("F.A.A.") expressly prohibited Northeastern from transferring or assigning the engine without ATASCO's approval until full payment of the purchase price had been made. Neither Northeastern nor ATASCO filed the Chattel Mortgage at that time. ATASCO ultimately did file the Chattel Mortgage in March, 1985.

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[1]The provisions of the Uniform Commercial Code involve pure issues of State law that require no determination by this Court. The Brief submitted in support of the Petition by Braniff raises State law issues which need not be addressed by this Court.

On November 28, 1984 Northeastern, in financial difficulty and indebted to Braniff, Inc. ("Braniff"), agreed to sell an aircraft containing the Engine to Braniff, another commercial airline carrier. Braniff checked the F.A.A. records for prior claims or liens upon the aircraft and its parts and found no filed claims. After the sale to Braniff was consummated, Braniff filed its Bill of Sale with the F.A.A. on November 30, 1984, and on December 7, 1984 Braniff sold the aircraft to William Condren after Condren also checked the F.A.A. records for a prior claim. Thereafter, Condren filed his Bill of Sale.

In early February, 1985 Condren leased the aircraft, with the Engine, with an option to buy to International Air Leases ("I.A.L."). The lease was never filed with the F.A.A., as required by 49 U.S.C. §1403. ATASCO filed its Chattel Mortgage with the F.A.A. in March of 1985 and in April of 1985 I.A.L. learned of ATASCO's Chattel Mortgage when Condren notified I.A.L. of ATASCO's interest by letter.

In June, 1985, I.A.L. actually procured a copy of ATASCO's Chattel Mortgage from the F.A.A. and was fully aware of its terms and conditions. Nevertheless, in late or early August of 1985, with full knowledge of ATASCO's Chattel Mortgage, I.A.L. exercised its option to buy the aircraft, including the Engine. I.A.L.'s Bill of Sale from Condren was filed with the F.A.A. on August 5, 1985, some four months after ATASCO's Chattel Mortgage was filed.

On August 27, 1985, ATASCO sued Braniff, Condren and I.A.L. for conversion, replevin and foreclosure on its Chattel Mortgage. Following discovery, ATASCO moved for summary judgment against I.A.L. only. I.A.L., Braniff and Condren cross-moved for summary judgment against ATASCO.

The United States District Court for the Southern District of New York granted summary judgment in favor of I.A.L., Condren and Braniff and dismissed ATASCO's complaint. The

Court found that the intervening conveyances from Northeastern to Braniff and from Braniff to Condren, prior to the recordation of ATASCO's Chattel Mortgage, served to extinguish ATASCO's Chattel Mortgage.

The Second Circuit Court of Appeals affirmed the summary judgment granted in favor of Braniff and Condren but reversed the judgment in favor of I.A.L. and directed the District Court to enter summary judgment in favor of ATASCO as against I.A.L. The Second Circuit Court of Appeals properly read this Court's decision in *Philko Aviation, Inc.* v. *Shacket,* 462 U.S. 406 (1983) and 49 U.S.C. §§1403(c) and 1406 to require reference to applicable state law to determine priorities among conflicting security interests and title once filing with the F.A.A. has occurred. Under New York's version of the Uniform Commercial Code, the Court of Appeals properly found that I.A.L.'s title was subject to ATASCO's previously filed Chattel Mortgage.

ARGUMENT I

The decision of the Second Circuit Court of Appeals is consistent with this Court's decision in *Philko Aviation, Inc.* v. *Shacket,* 462 U.S. 406 (1983) and with 49 U.S.C. §§1403(c) and 1406.

The Petitioners contend that the decision of the Second Circuit Court of Appeals is in conflict with this Court's decision in *Philko Aviation, Inc.* v. *Shacket,* 462 U.S. 406 (1983). The predicate for such argument is this Court's statement in *Philko* that

> ". . . the primary congressional purpose for the enactment of §503(c) . . . was to create 'a central clearing house for recordation of titles so that a person. wherever he may be would know where he can find ready access to the claims against or liens or other legal interests in an aircraft.' "

The Petitioners' argument, however, ignores the distinction between this Court's decision in *Philko* and the facts of this case. Additionally, the Petitioners' argument ignores the plain statutory language of 49 U.S.C. §§1403(c) and 1406.

In *Philko,* this Court was presented with a factual situation in which no filing was ever made with the F.A.A. Illinois law allowed unrecorded transfers of interests in aircraft to take precedence over innocent purchasers. Consistent with 49 U.S.C. §1403(c), this Court held that state laws that allow unrecorded interests in aircraft to affect innocent third parties are preempted. In effect, the reference in 49 U.S.C. §1406 to State Law for determining priorities has no applicability until a security interest is properly filed in accordance with 49 U.S.C. §1403.

This Court's decision in *Philko* foreshadowed the factual situation presented by this case. Although this Court did not have to reach the question of what would occur if Shacket had filed his interest, it specifically noted that once an interest is filed, priority is determined under state law:

> In support of the judgment below, respondents rely on *In re Gary Aircraft Corp.,* 681 F.2d 365 (CA5 1983), which rejected the contention that § 503 preempted all state laws dealing with the priority of interests in aircraft. *The Court of Appeals held that the first person to record his interest with the F.A.A. is not assured of priority which is determined by reference to state law. We are inclined to agree with this rationale, but it does not help the Shackets. Although state law determines priority, all interests must be federally recorded before they can obtain whatever priority to which they are entitled under state law.* As one commentator has explained: 'the only situation which priority appears to be determined by operation of the [Federal] statute is where the security holder has failed to record his interest. Such failure invalidates

> the conveyance as to innocent third persons. But recordation merely validates it; it does not grant priority.' (citations omitted) 462 U.S. at 413. (Emphasis supplied.)

This case presents precisely the factual circumstances that this Court was addressing in the above-cited portion of *Philko*. Here, ATASCO did file its Chattel Mortgage and I.A.L. took title after such filing, with full knowledge of the filing and with full knowledge of the terms and conditions of ATASCO's Chattel Mortgage. Consistent with 49 U.S.C. §§1403(c) and 1406, upon ATASCO's filing its Chattel Mortgage, all questions of priority are determined under applicable state law. Under New York's version of the Uniform Commercial Code, ATASCO's Chattel Mortgage was subordinate to the titles of both Braniff and Condren, who took without knowledge of ATASCO's Chattel Mortgage. However, also under New York's version of the Uniform Commercial Code, ATASCO's Chattel Mortgage was superior to I.A.L.'s title.

Petitioners claim that the decision of the Second Circuit Court of Appeals conflicts with the policy underlying the creation of a central registry for the recordation of interests in aircraft. However, as the Court of Appeals noted, Petitioners ignore the specific use of the word "until" in §1403(c)—rather than the word "unless"—and also ignore the Congressional decision to refer all questions of priority to applicable state law under §1406 once recordation with the F.A.A. has occurred. If Congress had intended to have intervening conveyances extinguish unfiled security interests without reference to state law, it would have been a simple matter for Congress to have so provided in the Federal Aviation Act. It did not do so. Instead, it specifically provided that no conveyances would be valid against innocent purchasers *"until* such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation." (49 U.S.C. §1403(c)).

Moreover, §1403(c) does not absolutely invadidate an un-

filed security interest. Under §1403(c), even an unfiled security interest is valid against the maker thereof and against all persons with actual notice of the security interest. Thus, while it was clearly the Congressional intention to establish a central office for the recordation of interests in aircraft, it was just as clearly not the intention of Congress to make filing an absolute condition precedent to the validity of interests in aircraft or aircraft parts.

Equally important, §1403 contains no time limitations upon the recordation of interests or provide for the extinguishment of interests under Federal law by virtue of the creation of intervening interests. Although Petitioners shrink from a full articulation of this position, it is clear that their position requires reading into §1403 a provision that an intervening interest, created prior to filing, will extinguish the unfiled interest and preclude the filing from having any effect. Under this formulation, §1406 becomes superfluous and the word "until" in §1403(c) is read out of the statute.

While Petitioners contend that the result reached by the Second Circuit Court of Appeals is commercially unreasonable, in truth, it is the interpretation of §1403 argued for by Petitioners that is commercially unreasonable. A secured lender could never assure the validity of a security interest unless it actually retained possession of the collateral until its security interest was filed wtih the F.A.A. Without such possession, even a single day's delay in filing would enable an unscrupulous borrower to grant other security interests or even sell the aircraft in the interim. Under Petitioners' formulation, such a conveyance would extinguish the secured lender's security interest.[2] The Federal Aviation Act clearly did not contemplate

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[2]Significantly, this result would nullify all of the relation-back of perfection provisions of the Uniform Commercial Code, made applicable by §1406. These relation-back provisions were clearly intended to prevent the precise result sought by Petitioners.

such a result. Thus, the result reached by the Second Circuit Court of Appeals is both consistent with *Philko* and with the clear and unambiguous language and the purpose of 49 U.S.C. §§1403(c) and 1406.

Petitioners' reference to *South Shore Bank* v. *Tony Mat, Inc.*, 712 F.2d 896 (3d Cir. 1983) is misplaced. Contrary to Petitioners' contention, the *Tony Mat* case is consistent with the decision of the Second Circuit Court of Appeals. In *Tony Mat*, the Third Circuit specifically recognized that the case differed from *Philko* because Tony Mat did eventually file its interest with the F.A.A. As such, 49 U.S.C. §1406 required reference to state law (in that case, Massachusetts' version of the Uniform Commercial Code). While South Shore Bank prevailed under the Uniform Commercial Code, the result was not dictated by §1403. If Tony Mat's interest had been extinguished by the intervening security interest created in favor of South Shore Bank, there would have been no need for the Court to have addressed the Uniform Commercial Code in order to reach a decision.

Similarly, Petitioners' reference to *South Shore Bank* v. *Johnson Hydraulic Mfg. Co.*, 131 Ill. App. 3d 1024, 477 N.E. 2d 1 (1985) and *Bank of Honolulu* v. *Davis*, 709 P.2d 613 (Intermed Ct. App. 1985) are also misplaced. In *South Shore Bank*, the unrecorded interest was held to prevail under Illinois law prior to this Court's decision in *Philko*. Upon reconsideration after *Philko*, the Court merely held that as to South Shore Bank, Johnson's interest was unrecorded and hence the Bank's rights are "superior" to Johnson's. In effect, the Bank stood in a similar position to that of Braniff and Condren with Johnson standing in a position similar to that of ATASCO. No one in the South Shore Bank case, however, occupied a position similar to that of I.A.L. Thus, the precise issue involved in this case was not involved in *South Shore Bank*.

In the *Bank of Honolulu* case, as in *Philko,* the putative buyer of the aircraft neglected to file its interest with the F.A.A. Thus, as to the judgment creditor, the buyer's title was inferior. The case did not, however, address what would have happened if the buyer had filed its interest and also did not address what would happen if, after the buyer had filed, the judgment creditor had attempted to convey her interest. In short, none of the cases cited by petitioners support their position.

The arguments raised by Braniff are largely founded on its view of what the result should be under the Uniform Commercial Code. Indeed, Braniff conceded, in its argument to the Second Circuit Court of Appeals, that §1403(c) and *Philko* are not controlling because ATASCO did file its Chattel Mortgage. Braniff argued, and continues to argue, that I.A.L. should prevail under the Uniform Commercial Code. ATASCO disputes this contention but shall refrain from addressing it here as it presents no issue for this Court to resolve. The Second Circuit Court of Appeals properly resolved the State Law issues in its decision.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied as it raises no issue of Federal Law and the decision of the Second Circuit Court of Appeals is consistent with this Court's decision in *Philko Aviation, Inc.* v. *Shacket,* 462 U.S. 406 (1983).

Respectfully submitted

STEPHEN F. HUFF
Counsel of Record

PRYOR, CASHMAN, SHERMAN & FLYNN
DONALD S. ZAKARIN
DAVID A. NICHOLAS
On the Brief
Counsel for Respondent
410 Park Avenue
New York, New York 10022
(212) 421-4100

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